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No. 87-186

In the Supreme Court of the United States

OCTOBER TERM, 1987

MOLDED ACOUSTICAL PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 773, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that the union's pre-election offer to waive initiation fees did not interfere with the election process on the ground that the offer extended to all employees, not just those employees who voted for the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 815 F.2d 934. The decision and order of the National Labor Relations Board (Pet. App. 31a-32a) and the decision of the administrative law judge are reported at 280 N.L.R.B. No. 163. The Board's prior decision and certification of representative (Pet. App. 22a-26a) are reported at 273 N.L.R.B. 156. The Regional Director's report and recommendation on objections to election (Pet. App. 27a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1987. A petition for rehearing was denied on May

4, 1987 (Pet. App. 40a-41a).[1] The petition for a writ of certiorari was filed on July 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1983, petitioner and Local 773, International Brotherhood of Teamsters, Warehousemen and Helpers of America (the Union), agreed that a union representation election would be held among a stipulated group of petitioner's employees (Pet. App. 3a). Eleven days before the election, the Union sent a letter to the employees in the stipulated unit urging them to vote for union representation. A postscript to the letter stated (*id.* at 4a):

> All employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract[.]

The election was held on December 30, 1983; 60 votes were cast in favor of Union representation and 55 against (*ibid.*).

Invoking this Court's decision in *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), petitioner objected to the election on the ground that the postscript in the Union's letter improperly induced the employees to vote for union representation. The regional director of the National Labor Relations Board found that petitioner's objection lacked merit. See Pet. App. 28a-29a. The regional director acknowledged that this Court held in *Savair Manufacturing* that "a union's announcement that it would waive initiation fees for employees who signed recognition slips prior to the election" constitutes im-

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[1] On July 8, 1987, Justice Brennan denied petitioner's application to this Court for recall and stay of the mandate of the court of appeals (Pet. App. 52a).

proper interference with the election (Pet. App. 28a-29a). He concluded, however (*id. at 29a*), that while the Union's letter

> may have been inartfully drafted, it is sufficiently clear that the statement means that the Union would waive payment of its initiation fee for all bargaining unit employees, without distinction, if the Union won the Board election and became their collective bargaining representative. There was no requirement that employees join the Union or take other action before the election as a condition of the Union's offer to waive the initiation fee.

Because "the waiver of the initiation fee was offered to all employees unconditionally," the regional director concluded that the Union did not violate the *Savair Manufacturing* rule (Pet. App. 29a).

Petitioner filed exceptions to the regional director's determination, but the Board upheld that determination by a divided vote, certifying the Union as the exclusive representative of petitioner's bargaining unit employees. See Pet. App. 22a-26a. The Board "adopted the Regional Director's findings and recommendations" (*id.* at 22a (footnote omitted)). Chairman Dotson added that petitioner's interpretation of the Union's statement—that the initiation fee waiver extended only to employees who voted for the Union—was "unreasonable in light of the Board's fully publicized secret ballot procedure" (*ibid.*).[2]

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[2] The election notices that the Board requires to be posted at a place of employment (see 29 C.F.R. 101.19(a)(1)) state: "The election will be by SECRET ballot under the supervision of the Regional Director of National Labor Relations Board." The notice further advises the voter: "Mark your ballot in secret in the voting booth provided; DO NOT SIGN YOUR BALLOT." "Fold the ballot before leaving the voting booth, then personally deposit it in the ballot box under the supervision of an agent of the Board." See Form NLRB-707.

Member Hunter dissented. He concluded that the Union's statement was ambiguous because it was "equally susceptible of the interpretation that the offer to waive the initiation fee was conditioned on the individual employee's vote in the election" (Pet. App. 24a-25a). Member Hunter would have set aside the results of the election and ordered a second election.

Following the certification of the Union, petitioner refused to bargain with the Union. The Board found that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), and issued an order directing petitioner to bargain with the Union upon request. Pet. App. 5a, 6a.

2. The court of appeals, by a divided vote, upheld the Board's findings and enforced the bargaining order. See Pet. App. 3a-21a. The court stated that this Court's decision in *Savair Manufacturing* established the rule that a union may not offer to waive initiation fees only for those employees who sign union recognition slips prior to a representation election. However, "a union has a legitimate interest in waiving its new member initiation fee, and * * * it may do so as long as the waiver applies 'not only to those who have signed up with the union before an election but also to those who join after the election.' " *Id.* at 7a-8a, quoting *Savair Manufacturing,* 414 U.S. at 274 n.4. The court of appeals held that the Board reasonably concluded that the Union's offer here fell in the permissible category. Pet. App. 12a.

The court of appeals acknowledged the Board rule that "ambiguities" in union literature are to be construed against the union (Pet. App. 9a-10a n.3). It concluded that the Union's statement here was not ambiguous. The court stated that "the only plausible interpretation of the Union's pre-election offer to waive initiation fees is that it was intended to apply to all employees in the bargaining unit." *Id.* at 11a; see also *id.* at 10a n.3. The court ex-

plained that "[b]ecause the ballots in a Union election are kept secret even after the vote is tallied, the Union will never be able to determine which employees actually voted for Union representation" (*id.* at 10a (footnote omitted)). In these circumstances, the court said "it would be highly illogical" to interpret the Union's pre-election letter as a proposal "to deny certain employees the promised fee waiver because they did not vote for union representation" (*id.* at 11a). The court rejected the argument that an employee might misinterpret the scope of the initiation fee waiver: "we do not choose to ascribe the level of ignorance to employees that acceptance of this argument would necessarily require. No reasonable employee would view a vote for union representation in a secret ballot election as the *quid pro quo* for a waiver of initiation fees" (*id.* at 12a).

Judge Garth dissented (see Pet. App. 16a-21a). In his view, the Union's statement could reasonably be interpreted as limiting the fee waiver to those employees who voted for the Union. Invoking the Board's rule that ambiguous statements should be construed against the maker, he interpreted the Union's statement here as an impermissible offer to waive initiation fees only for Union supporters.[3]

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. In *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), a union had, prior to a representation election, announced a selective

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[3] The court of appeals denied petitioner's motion for a stay of mandate pending the filing of a petition for a writ of certiorari (Pet. App. 50a-51a); Justice Brennan subsequently denied petitioner's application for a recall and stay of mandate (*id.* at 52a).

waiver of its initiation fee for employees who signed union recognition slips before the election; those employees who did not sign such slips would not get the benefit of the fee waiver. This Court held that the union's selective waiver of its initiation fee impermissibly interfered with the employees' right to choose freely whether to have union representation. The Court said, however, that a union has a legitimate interest in waiving its initiation fee when the waiver is "available not only to those who have signed up with the union before an election but also to those who join after the election" (414 U.S. at 274 n.4). The courts of appeals have since uniformly held that offers to waive fees for all employees currently in the work force, not conditioned on whether the particular employee supported the union, do not interfere with employee free choice in representation elections and therefore are not improper inducements under *Savair Manufacturing*.[4]

In this case, both the Board and the court of appeals followed these controlling principles. See Pet. App. 7a-11a, 22a, 29a. The Board, upheld by the court of appeals, found that the Union's statement here constituted a permissible promise to waive initiation fees for all members of the bargaining unit and could not be read by a reasonable employee as an impermissible promise to waive fees selectively for those employees who voted for the Union. Petitioner's challenge to that conclusion raises only a factual issue that does not warrant review by this Court.

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[4] See, *e.g.*, *NLRB* v. *Dunkirk Motor Inn, Inc.*, 524 F.2d 663, 665 (2d Cir. 1975); *NLRB* v. *Stone & Thomas*, 502 F.2d 957, 958 (4th Cir. 1974); *Thrift Drug* v. *NLRB*, 521 F.2d 243, 244 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976); *NLRB* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-1313 (6th Cir. 1975); *Altman Camera Co.* v. *NLRB*, 511 F.2d 319, 322 (7th Cir. 1975); *NLRB* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (8th Cir.), cert. denied, 423 U.S. 827 (1975); *NLRB* v. *Aaron Bros. Corp.*, 563 F.2d 409, 412-413 (9th Cir. 1977).

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 491 (1951); see *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978). Moreover, there is substantial evidence in support of the Board's conclusion that the only reasonable interpretation of the waiver offer under the circumstances was that the waiver extended to all bargaining unit employees.

The challenged sentence of the Union's letter stated that "[a]ll employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them" (Pet. App. 4a). The regional director concluded (*id.* at 29a) that this statement simply advised employees that, if the Union won the election, all current employees would be excused from payment of the Union's initiation fee: the sentence identifies a benefit—relief from the initiation fee—and states that it would be enjoyed by "all" unit employees. The regional director found it "sufficiently clear" (*ibid.*) that the phrase "if they vote for the Teamsters to represent them" merely identified the only circumstance in which the question of a fee would arise—if the employees selected the Union. This interpretation is supported by the final sentence of the postscript (Pet. App. 4a)—"[a]lso dues will not be payable until there is a signed contract"—which says nothing about the way individual unit members may choose to vote. Rather, it assures employees that, if the Union were voted in, monthly dues would be postponed until the Union obtained its first contract.

2. Petitioner seeks to cloak its challenge to this essentially factual determination in legal terms, but its claims that the Board and the court applied erroneous legal standards are meritless.

a. Petitioner repeatedly argues (Pet. 14, 22-26) that the Board and the court of appeals ignored the rule that, where a waiver offer "is ambiguous and subject to a reasonable interpretation by the employees that they can avoid initiation fees by joining the Union prior to the elec-

tion," it is impermissible under the *Savair Manufacturing* rule. See, *e.g., California State Automobile Ass'n,* 214 N.L.R.B. 223, 224 (1974). But the court of appeals specifically cited this rule (Pet. App. 9a) and went on to conclude that the waiver offer was not ambiguous because the Board's interpretation of the offer was the only "plausible" one (Pet. App. 10a n.3, 11a). The regional director closely analyzed the terms of the offer and found it "sufficiently clear" that the offer had been extended to all employees (*id.* at 29a). Accordingly, there is no basis for petitioner's assertions that the decisions below construe an ambiguous offer in the union's favor.[5]

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[5] Petitioner contends (Pet. 23-24) that the dissenting opinions below show that the offer was ambiguous. But those opinions show only that one member of each tribunal had a different view regarding the meaning of the offer. Two members of the Board and two judges of the court of appeals concluded that the offer was not ambiguous.

Petitioner also cites (Pet. 22-23) a variety of other decisions in an effort to establish ambiguity here. But there is a clear difference between the limited waiver offer to "charter members" in *Coleman Co.,* 212 N.L.R.B. 927, 927-929 (1974), and *Inland Shoe Mfg. Co.,* 211 N.L.R.B. 724 (1974), and the offer made to "all" employees here. While "charter members" may be understood to refer to those joining the union prior to the election because it connotes early membership, the offer here did not distinguish among the employees on any basis ascertainable by the union or its supporters. See also *NLRB* v. *L.D. McFarland Co.,* 572 F.2d 256, 259 (9th Cir.), cert. denied, 439 U.S. 911 (1978) (rejecting the view that use of phrase "any member" rather than any employee was fatally ambiguous). In *Deming Division, Crane Co.,* 225 N.L.R.B. 657, 659 (1976), the union waiver offer was conditioned on pre-election support: it was expressly limited to "anyone joining now during this campaign." Similarly, the waiver offers in *NLRB* v. *Aladdin Hotel Corp.,* 584 F.2d 891, 893 (9th Cir. 1978), and *NLRB* v. *Johnson & Hardin Co.,* 554 F.2d 275, 276 (6th Cir. 1977), were keyed to a decision to join the union during the organizational campaign. In *NLRB* v. *Semco Printing Center, Inc.,* 721 F.2d 886, 889-890 (2d Cir. 1983), the court of appeals upheld the Board's finding, based on credibility determinations, that the union

b. Petitioner's contention (Pet. 14-15) that "the Board and the Third Circuit in effect held that * * * a pre-election promise to waive initiation fees * * * can never amount to an unlawful inducement because, by virtue of the Board's secret ballot election process, no employee would believe that the offer was an inducement to vote for representation[,]" also misconstrues the decisions of the Board and the court of appeals. Neither the Board nor the court stated that a waiver offer is always permissible. They simply recognized that the secret ballot process was a relevant consideration in determining whether the Union's offer was ambiguous. See Pet. App. 10a-11a, 22a n.1. No employee would reasonably believe that the Union's offer was limited to employees who voted for the Union, the court concluded, because the employee would understand that the Union had no way of ascertaining how the employee in fact had voted.[6]

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representative had not limited the waiver offer to employees who joined before the election, but extended it, as here, to all employees working in the bargaining unit at the time any collective agreement was signed.

[6] Petitioner invokes (Pet. 16-19) the language and rationale of this Court's decision in *Savair Manufacturing*, asserting that the Board's decision here "ignores the realities of the situation" (414 U.S. at 277). The Court in *Savair Manufacturing* described the relevant "realities" as the fact that "[w]hatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union[,] * * * [that] [h]is outward manifestation of support [may] serve as a useful campaign tool in the union's hands [and that] while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union" (*id.* at 227-278).

In this case, no employee was asked to make any pre-election manifestation of support that might influence his own vote or the vote of other employees. In addition, the Board, affirmed by the court of appeals, found that no reasonable employee would understand that a

c. Finally, petitioner errs in suggesting (Pet. 19-22) that the court of appeals' decision turns upon the court's assessment of the Union's intent in making the waiver offer. In *California State Automobile Ass'n*, 214 N.L.R.B. at 224, the Board made clear that the proper test in interpreting a waiver offer is the perception of a reasonable employee, not what the employees actually understood the Union to mean or what the Union intended. The court of appeals applied that test in this case. The court discussed the Union's intent in the context of assessing what the employees reasonably could have understood the offer to mean. In that context, the court stated that the Union could not have intended to key its offer to the employees' secret ballot vote because it would never be able to ascertain with certainty which employees had voted for union representation. The court did not hold that, irrespective of the objective impact on the employees, the Union's subjective intent governs. Indeed, the court went on to find that no reasonable employee could interpret the Union's waiver offer as a limited waiver conditioned on an employee's vote in the election. See Pet. App. 12a.[7]

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waiver of initiation fee depended on how he voted in the secret ballot election. The decisions below are therefore entirely consistent with the "realities" recognized in *Savair Manufacturing*, as well as the rationale of that decision. Petitioner suggests (Pet. 17-18, 19) that an employee might believe that the union could ascertain his vote. In view of the clear notices regarding ballot secrecy (see note 2, *supra*), that speculation is wholly unfounded.

[7] Petitioner's suggestion (Pet. 26-28) that the court of appeals erred in not taking into account the closeness of the election result is equally without merit. The Court in *Savair Manufacturing* stated (414 U.S. at 271, 281) that because of the closeness of the election, the impermissible waiver there may well have actually influenced the results of the election. The Court did not hold that the closeness of the election should be a factor in determining whether an offer was impermissibly based on pre-election support under the *Savair* rule. The appropriate

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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inquiry is an examination of the union's offer and other relevant circumstances to determine how a reasonable employee would interpret that offer.

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